Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

October Term - 1996

PAUL C. AND DEBRA L. NORDBERG,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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69 pp

QUESTIONS PRESENTED

1. Should 26 U.S.C. Section 1221(1), an income tax provision which excludes certain assets from the definition of capital assets, and which nowhere mentions securities, securities traders, or any similar or related terms, be interpreted to single out securities traders for unique adverse treatment by denying them ordinary loss deductions on business losses resulting from day-to-day operations, a tax benefit enjoyed by all other businesses?

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2. In construing a statutory provision applicable to countless thousands of business people (here, 26 U.S.C. Section 1221(1)) may the courts:

(a) infer a meaning, the singling out of securities traders for denial of ordinary loss treatment on operating losses, which is neither found nor suggested in the text of the statutory provision itself;

(b) while relying instead for such meaning upon a solitary comment in a Congressional committee report relating to enactment of the statute; and

(c) ignoring that the predecessor of the statute being construed contained a provision specifically singling out securities traders for adverse tax treatment on operating losses, and that that provision was explicitly repealed by the statute being construed?

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3. Whether longstanding but incorrect judicial interpretation of a provision of the tax code, not supported by the content of the statute, nevertheless, acquires legitimacy by passage of time, thereby properly denying a citizen the right to rely upon the actual content of the statute.

LIST OF PARTIES

The names of all parties to these proceedings are listed in the caption of this case:

A. Paul C. and Debra L. Nordberg, a married couple; and

B. The United States of America

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No.

In the

Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Paul C and Debra L. Nordberg, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in the above-styled proceedings as entered on October, 10, 1996.

OPINIONS BELOW IN THE CASE

1. An unpublished, per curiam, affirmance entered by the Court of Appeals for the First Circuit on October 10, 1996. (*See:* Appendix at pages A1 - A3). This decision adopts the findings and reasoning of the District Court.

2. The judgment of the Court of Appeals for the First Circuit (affirming the District Court judgment) dated October 10, 1996 (*See:* Appendix at page A4)

3. The Memorandum and Order, dated April 8, 1996, of the United States District Court for the District of Massachusetts, granting summary judgment to the government. (*See*: Appendix at pages A5 - A26).

4. The Judgment entered by the District Court on April 8, 1996. (*See*: Appendix at page A27).

BASIS OF JURISDICTION

Petitioners seek further review of the final decision and judgment of the Court of Appeals, dated October 10, 1996, pursuant to 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

26 U.S.C. Section 1221(1), which defines capital assets:

> Section 1221. Capital asset defined.
>
> For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include --
>
> (1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business:
>
> (2) ...

STATEMENT OF THE CASE

This dispute relates to petitioners' 1987 federal income taxes. In 1987 defendant Paul C. Nordberg was engaged in the trade or business of being a securities trader. He actively traded a particular "derivative," Standard & Poor's 100 Index Options, seldom holding any position for more than two days and never holding any position as long as a week. Mr. Nordberg incurred an operating loss in 1987 in his securities trading business. Petitioners treated that loss as an ordinary loss and utilized it to offset other taxable income on their 1987 tax return.

Petitioners were selected for an exhaustive audit of their 1987 tax return, which lasted more than eighteen months. On May 2, 1990 the Internal Revenue Service issued petitioners a "no change" audit report.

Subsequently the Internal Revenue Service re-opened the audit and proposed a $44,000 adjustment (increase) in petitioners' 1987 federal income tax liability, asserting that the operating loss incurred in Mr. Nordberg's securities trading business was, as a matter of law, a capital loss, of which only $3,000 could be used to offset otherwise taxable income from other sources.

Petitioners filed an administrative appeal within the Internal Revenue Service. In November, 1991, when the appeal had languished for well over a year without being resolved, petitioners paid the entire amount in controversy to the IRS and demanded refund of same. They did this in order to perfect a right to litigate the dispute in the District Court, before a jury, rather than a bench trial in the Tax

Court, if they had not paid the contested taxes.

In late December, 1991 the United States issued petitioners the refund they had demanded. Later the United States asserted that the refund was issued erroneously and requested repayment of same. Petitioners refused.

Thereafter the United States sued petitioners pursuant to 26 U.S.C. Section 7405 to recover the allegedly erroneous refund.

The pivotal issue is whether the Congress has enacted and maintained law, within Section 1221(1) of the Tax Code, which singles out securities traders for different tax treatment on an operating loss from any other type of business person in the United States' economy. The issue arises in the context of there once having been a section in the tax code which did exactly what the government alleges (singling out securities traders for unique adverse treatment on operating losses) -- but which the Congress repealed and replaced with Section 1221(1), which makes no reference to securities, securities traders, or any similar terms.

REASONS FOR GRANTING THE WRIT

A. The Supreme Court Should Issue A Writ Of Certiorari To Provide The Lower Courts With Additional Guidance As To Their Powers, And Limitations, In Construing Federal Statutes.

Turning the English language and rules of statutory construction on their heads, the courts below, here, (*See:* Appendix at A16-A21; A2) and several others, (*See e.g.* Burnett v. Commissioner, 40 B.T.A. 605 (1939); Mirro-Dynamics Corp. v. United States, 374 F.2d 14, 16 (9th Cir. 1967); Kemon v. Commissioner, 16 T.C. 1029 (1951); United States v. Wood, 943 F.2d. 1048 (9th Cir. 1991)) have held that the language of Section 1221(1) of the tax code, which nowhere mentions securities, securities traders, securities dealers, or any similar terms, should be read to be Congress' action in singling out securities traders, from all other business people in the United States for uniquely adverse tax treatment -- by dictating that when a securities trader incurs an operating loss in a given year, that loss is a capital loss, as a matter of law, so that only $3,000 is available to offset other taxable income of the taxpayer, as opposed to an ordinary loss, the entirety of which is available to offset other taxable income in the same year.

A fundamental and longstanding axiom of the tax code, understood and relied upon by the public, is that "[p]rofits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss." *See:* Corn Products v. Commissioner 350 U.S. 46, 52 (1955). Exceptions to this well understood rule should be codified within the tax

code, not buried in obscure legislative history which contradicts a reasoned reading of the tax statute's language. The courts below have missed this point.

The decisions below and the precedents on which they rely are all based on a single mistaken hypothesis -- that the words "ordinary" and "to customers," as embodied in 26 U.S.C. Section 1221(1), are actually a form of comprehensible and enforceable "code," drafted by the Congress for the narrow purpose of singling out securities traders for uniquely adverse tax treatment in the event they incur an annual loss from their day-to-day operations. None of these decisions makes any attempt to explain why this concept, so easily drafted and once clearly stated in the tax code (*See: 72d Congress, Session I, Chapter 209* - The Revenue Act of 1932 at Section 23(r) - Appendix at A28-A29), is missing from the words of the statute as it is now written.

This petition is more important than the narrow holding of the First Circuit as to which Petitioners seek further review. The decisions below, here, and the precedents on which they rest advocate a flawed and dangerous theory of statutory construction by the federal courts. They are based on the thesis that when Congress repeals a statute (in this case Section 23(r) of the Revenue Act of 1932, which had set up a clearly stated limitation on securities traders using operating losses to offset other taxable income, but which was explicitly repealed by *73d Cong. Sess. II, Chapter 277, Section 63* - The Revenue Act of 1934) and replaces it with language with no relationship to any continued validity of the repealed provision, a member of Congress or a committee can continue the provision as law

by simply burying in an obscure committee report a naked assertion that the committee drafting the new statute intends that precisely the narrow concept being removed from the language of the statute continues. This produces the disingenuous result that the provision, after being systematically removed from the statute, continues nevertheless to be the law.

In football that sort of action is called a misdirection play -- getting the defense to look one way, while the ball carrier heads off in the other. It's good sport, based on deception, but not good law.

Citizens and taxpayers should be able to look to a single place, the statute, when they want to learn the essence of a law. If Congress intends securities traders to be treated differently for taxes from other business people it should say so, in the statute, rather than bury such an alleged intent in an obscure Congressional committee report which is effectively beyond the discovery of the average taxpayer.

The position of the government, below, which was adopted by the 1st Circuit (see Appendix at A16-A20) is that the words "ordinary" and "to customers," were drafted by Congress for the narrow and intended purpose of singling out securities traders from all other taxpayers for adverse tax treatment. They divine this extraordinarily narrow meaning, nowhere suggested in the text of the statute, from comments in a Congressional committee report in 1934 (*See: H.R. Conf. Rep. No. 1385; 73d Cong. 2d Sess. 22 (1934)*).

The decisions below represent a transparently inappropriate use of legislative history to construe a federal

statute. The willingness of the lower courts to so act is symptomatic of a problem larger than the holdings below in this case. By granting certiorari here the Supreme Court can provide the lower courts with additional guidance on the important issue of what does, and what does not, constitute the Congressional enactment of a valid and enforceable provision of law.

The pivotal issue is the error of the courts below in looking for a meaning, outside the statute, which is nowhere to be found -- or even suggested -- within the text of the statute. There must be a genuine ambiguity concerning the issue for the court to look outside the simple language of a statute. A court cannot properly find, outside the statute, a meaning not reasonably included in the words found in the statute. *See:* Connecticut National Bank v. Germain, 503 U.S. 250, 253, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391, 398 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'"); *See also:* National Tax Credit Partners, L.P. v Havlik, 20 F.3d. 705, 707 (7th Cit. 1994) ("statutes...often have multiple purposes. Courts enforce not these purposes in the abstract but the rules embedded in the language, which may track the purposes only imperfectly. Knowing the purposes behind a rule may help decode an ambiguous text, but first there must be some ambiguity."); *See also:* Patterson v. Shumate, ___ U.S. ___, 112 S.Ct. 2242, 2246, 119 L.Ed.2d 519, 526 (1992); ("In our view the plain language [of the statute] is our determinant.") The Supreme Court went on in Patterson to succinctly state the rule: "We must enforce the statute according to its terms." Id. at 2247.

The courts below, here, and the courts in the precedents on which they relied looked to legislative history for their conclusion -- that the words "ordinary" and "to customers" in Section 1221(1) codify a narrow Congressional intent to single out securities traders for unique tax treatment. That's wrong for a very straightforward reason. For those courts to look outside the words of the statute for the remarkably narrow conclusion they reach, the words in the statute would have to be ambiguous on the issue of whether there was an intention to single out securities traders for unique tax treatment. But, they're not. The words in the statute don't provide any clue, whatsoever, that they might have been drafted to legislate a singular tax treatment on securities traders, a readily identifiable class of taxpayers nowhere even mentioned in the section.[1]

It appears that no court has ever made the crucial finding which would be a predicate to looking to legislative history and reaching the conclusion found below -- i.e. that the words in the statute are ambiguous on the point decided. The reason no court has made that crucial finding, which should precede a foray into legislative history, is obvious. Such a finding would be hallucinatory.

The lack of ambiguity in the statute is made more obvious by other considerations:

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[1] ***This truth is demonstrated not only by a simple reading of the words of Section 1221(1). It is further shown by the fact that a team of three trained IRS auditors spent eighteen months reviewing petitioners' 1987 tax filings, then issued the May 2, 1990 "no change" audit report -- precisely because those auditors failed to find so much as a hint of the meaning for Section 1221(1) inferred by the courts below, from legislative history, within the words of the section.***

1. The prior law which was repealed.

The language in question, now embodied in Section 1221(1), was drafted in 1934. The language nowhere mentions securities, securities trading, or any similar or reasonably related terms. The statutory provisions these words effectively replaced are most informative.

The predecessor section was Section 23(r) of the Revenue Act of 1932 (*See:* Appendix at A28-A29 - *72nd Cong., Sess. I. Chapter 209*). Section 23(r) had set forth precisely the dichotomy between the tax law treatment of operating losses of securities dealers versus securities traders, which the courts below have imputed (via legislative history) to Section 1221(1). The problem is that the provisions of Section 23(r) existed only from 1932-1934, having been repealed by the Congress via Section 63 of the Revenue Act of 1934 (*See: 73rd Cong. Sess. II. Chap. 277; Section 63)*.

Congress' action in 1932, in passing Section 23(r), leaves no doubt that it understood the need to codify so narrow a legislative intent as singling out securities traders for unique adverse income tax treatment in clear terms, within the statute. Section 23(r) also leaves no doubt that Congress is capable of performing the task of drafting such clear language within the text of the statute. The decisions below, here, and the precedents on which they rest, simply adopt the ostrich theory of dealing with a crucial issue. They fail to explain how precisely the provision which was then being removed from the language of the tax law continued as good law via a simple contradictory comment buried in a 1934 Congressional committee report. The Supreme Court has noted that, when Congress amends laws

"it does not write on a clean slate." *See:* Dewsnup v. Timm, 502 U.S. 411, 418, 112 S.Ct 773, 779, 116 L.Ed.2d 903, 912 (1992). The reasonable meaning of Section 1221(1), which nowhere mentions or singles out the securities industry or any trades of businesses within it for unique tax treatment, must be understood in the context of the prior statute, as embodied in Section 23(r), which had clearly singled out securities traders for unique adverse treatment on operating losses under the tax code. Against that statutory background, the language of Section 1221(1) can only be construed as a repeal of precisely the provision which the courts below here have held it creates or maintains.

2. Congress' historic record of codifying distinct tax treatments for distinct classes of taxpayers.

For decades Congress has shown that, when it wants to legislate different tax treatments for identifiable groups of taxpayers, it includes such language in the statute. Title 26 of the United States Code reflects a myriad of them. A few examples of this wide ranging statutory procedure include:

> Section 2(a) - distinct tax treatment of surviving spouse taxpayers;
>
> Section 41(b) - distinct tax treatment of start-up enterprises;
>
> Section 42- distinct tax treatment of producers of low-income housing;

Section 43 - distinct tax treatment of users of enhanced oil recovery methods;

Section 48 - distinct tax treatment of taxpayers engaged in reforestation.

Most telling as to the error of the decisions below and the precedents on which they rely, is 26 U.S.C. Section 1091. Section 1091 does create and provide for a statutory distinction between the tax treatment of securities dealers and securities traders, which disadvantages traders -- but only on a tangential aspect of the operations of those two types of businesses, "wash sales" near the end of the taxable year.[2]

The decisions below are premised on the implausible theory that the Congress has seen fit to set up and maintain, within the Section 1091 of the tax law, a narrow and clearly stated distinction as to the tax treatments of securities dealers and securities traders on a tangential area of their operations, wash transactions -- but on the fundamental tax issue concerning their day-to-day operations, a statutory dichotomy is intended in which traders are treated adversely, even though there is no section in the code so stating.

As this Court has observed "[I]t is generally presumed

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[2] ***A "wash sale" is a set of transactions in which a taxpayer sells securities (to realize a loss on them) -- then quickly buys back essentially clone securities (issuer and amount) with the intention of continuing to hold essentially the same position in the securities on which the taxpayer sought to realize the loss. Section 1091 allows a securities dealer to do this, under certain conditions, realizing the loss for taxable purposes, but dictates that a securities trader acting the same way does not realize the taxable loss in the year of the "wash" transactions.***

that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it from another." *See:* BFP v. Resolution Trust Corporation, ___ U.S. ____, 114 S.Ct. 1757, 1761, 128 L.Ed.2d 556, 564 (1994) referring to Chicago v. Environmental Defense Fund, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302 (1994).

There is no explanation why securities dealers and securities traders are separated into a clearly-stated dichotomy in Section 1091 for the purposes of distinct tax treatments on one possible aspect of their operations, wash sales, but when the Congress allegedly wanted to treat those two type of businesses differently as to the fundamental manner in which they are taxed it failed to draft a section like Section 1091, which mentions securities dealers, securities traders and/or reasonably related terms, then states the intended tax treatment(s).

Instead the courts below looked to obscure legislative history for a concept nowhere found or plausibly suggested in the text of the statute. This Court has made clear that is unacceptable. "Why should we, then, rely upon.....a committee report that did not result in legislation? Simply put, we shouldn't." *See:* Chicago v. Environmental Defense Fund, ___ U.S. ____, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302, 311 (1994); quoting with approval Environmental Defense Fund, Inc. v. Chicago, 948 F 2d 345, 351 (7th Cir. 1991).

Common sense and precedent tell us that, when the words of a later statute, like Section 1221(1), differ from the words of an earlier statute, like Section 23(r) of the Revenue

Act of 1932, the Congress intended to achieve a different result. *See:* Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1441 (D.C. Cir. 1988); Klein v. Republic Steel Corp., 435 F.2d 762, 765-766 (3rd Cir. 1970).

The decisions below stand for the troublesome proposition that a system of secret laws is acceptable in the United States. In the government's view so narrow and easily codified a tax law provision can be hidden in legislative history rather than being written into the statute, then used to ambush unsuspecting taxpayers, like petitioners, here, who thought that the text of the statute would say different securities businesses were taxed differently if that were Congress' intent, just like Section 1091 establishes different treatments for a portion of the operations (i.e. "wash sales") of such businesses which are not relevant to the dispute here.

B. The Supreme Court Should Issue A Writ Of Certiorari To Require The First Circuit To Follow Supreme Court Precedent (Snyder) And To Resolve Conflict In The Lower Courts Whether This Dispute Turns On An Issue Of Fact Or An Issue Of Law.

The tax laws should be administered with uniformity and adjudicated with uniformity. Despite the failure of the courts below to address them, there are conflicting precedents:

1. In 1935 the Supreme Court observed that a securities trader trading "on the stock exchange may treat

losses thus incurred as having been sustained in the course of a trade or business [ordinary loss]" *See:* Snyder v. Commissioner of Internal Revenue, 55 S.Ct. 737, 739 (1935).

Snyder, which related to a 1928 tax return, therefore not governed by Section 23(r) of the Revenue Act of 1932, as was in effect from 1932-1934, has never been overturned. This Court has not repudiated Snyder. The Congress has never passed a law with a clearly stated intention of overturning Snyder. Nor has the Congress ever amended the definition of capital assets to deal with the proper tax treatment of day-to-day securities transactions of securities traders. This stands in stark contrast to Section 1091, which deals with year end "wash" sales of securities traders.[3]

In 1979 the Court of Claims stated clearly that Snyder is still good law, that a securities trader realizes ordinary loss on day-to-day operations if a loss is incurred. That position is in conflict with the decisions below here. *See:* Levin v. United States, 597 F.2d 760, 765 (Court of Claims, 1979).

Nowhere in the briefs or decisions below does any party here suggest anything has happened which would have

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[3] ***There also appears to be no explanation as to why the Congress, if it intended to single out securities dealers for particular tax treatment under the language of Section 1221, failed to simply include such a provision, clearly stated in the section-- as the Congress has seen fit to include in the remainder of Section 1221 relating to other clearly specified groups of taxpayers (i.e. those dealing in copyrights, literary, musical or artistic compositions; and those transacting business related to U.S. Government publications.).***

changed the outcome of this dispute from 1979 until the present. There is continuing conflict.

Despite the fact that this issue was clearly raised before the District Court and the Court of Appeals, the United States failed to respond to it in any of its briefs. Respondent failed to urge either: (a) that petitioners misread the meaning of Snyder, or (b) that Snyder is somehow no longer good law; or (c) Snyder is distinguishable from the case at bar. The Courts below, likewise, failed to address the issue in any way.

2. There is also conflict as to whether the issue here is one of law (as was found below, here, resulting in the entry of summary judgment) or one of fact, which should have been left to the jury, thereby precluding summary judgment.

For a contrary view to those of the District Court and Court of Appeals for the First Circuit, here, we can turn to the District Court in Florida, which held as follows:

> Whether property is held [pursuant to Section 1221(1)] primarily for sale to customers is a question of fact and each case must be determined upon the basis of its own peculiar facts.

See: Bruning v. United States of America, 273 F. Supp. 349, 352 (M.D. Fla. 1967).

The District Court in Florida states unequivocally that the issue of whether Mr. Nordberg's sales were "to

customers," is a unique question of fact in every instance, which should go to the jury. The District Court in Massachusetts and the Court of Appeals for the First Circuit say exactly the opposite.

C. The Supreme Court Should Issue A Writ of Certiorari To Provide The Lower Courts Needed Guidance As To What Constitutes Repeal Of A Statutory Provision.

From 1932-1934, a limitation on professional securities traders using an annual operating loss from day-to-day operations as ordinary loss to offset other taxable income existed in the tax code, as embodied in Section 23(r) of the Revenue Act of 1932. That provision was there because the Congress had put it in the tax code.

In 1934 that language was repealed from the code (via Section 63 of the Revenue Act of 1934) and never replaced with any language which bore any plausible resemblance to restating that tax provision, or in any way continuing to single out securities traders for unique tax treatment (other then Section 1091, dealing with wash transactions not relevant to the securities sales by petitioners, here). The 1932 language left the tax code in 1934 for the same reason it had earlier entered it -- Congress had so acted, by voting a repeal.

The simple history recited in the two paragraphs immediately above must constitute repeal of the tax provision in dispute here. If it does not, the law means little -- because then the citizenry can't find the viable provisions of

the law in the statutes enacted by the Congress, and the citizenry can't rely upon the fact that, when Congress removes provisions from statutes, that action constitutes a repeal of those provisions. What does the law mean if that is the situation?

This simple concept has somehow escaped a significant cross-section of the lower courts. It is a concept with wider implications than this case alone. The Supreme Court should grant certiorari to state clearly to the lower courts what should be obvious but apparently is not -- when Congress first puts a provision in a statute, then later takes it out of the statute, the provision is repealed and gone -- and no amount of contrary monologue in an obscure Congressional committee report can create or continue a prior statutory provision that Congress has explicitly removed from the statute.

D. The Supreme Court Should Issue A Writ Of Certiorari To Debunk The Fictitious "Merchant Analogy" Which The Lower Courts Have Created To Prop-up A Judicially-Enacted Tax.

In attempting to "make" law, nowhere codified in the statute, thereby snuffing out citizens' rights to a jury trial, the courts, both here and in the precedents relied upon below, have wandered even further astray. They have created the judicial artifice of the "merchant analogy," attempting to distinguish between securities dealers and securities traders, two types of business people never mentioned in Section 1221(1). *See:* Appendix at A17-A21. *See e.g.,;* United States v. Wood, 943 F.2d 1048, 1051 (9th

Cir. 1991); Kemon v. Commissioner, 16 T.C. 1026, 1032-1033 (1951).

The merchant analogy is an artificial and unworkable fiction. Under it taxpayers who sell goods or services without performing a merchant function, are deemed to lack "customers," and therefore are deemed to deal only in capital assets pursuant to Section 1221(1). Under the merchant analogy as ordained by the courts below, numerous other types of business people would deal only in capital assets. For example -- artists who rely upon dealers to market their work -- numerous producers of goods who entrust their products on consignment to marketing agents -- countless farmers and producers of livestock who rely upon marketing services and co-ops to sell their production -- and many others. Under the merchant analogy the annual profit or loss of these and many other different types of business people would be capital gain or capital loss, not ordinary income or loss, because they entrusted the marketing end of their businesses to third parties, as petitioners here did with a brokerage house.

Neither the IRS nor the Courts administer or adjudicate the tax laws in any other arena as though the merchant analogy is real -- because it's a fiction, devised to prop up a non-existent tax provision (capital loss treatment on securities traders' operating losses) nowhere found in the law.

E. The Supreme Court Should Overrule Burnett, And Its Progeny - Which Inappropriately Rely Upon Inaccurately Researched Legislative History.

How did this all go so wrong? The source of the error in the decisions by the courts below, and the precedents upon which they relied, is clear. The line of cases relied upon by the Court of Appeals and the District Court, here, are the progeny of a seminal case, O.L. Burnett v. Commissioner 40 B.T.A. 605 (1939). Burnett is wrong, at two levels. First the Burnett court incorrectly looked to the legislative history. For it to have properly done so, and reached the conclusion it did, it would have been necessary for that court to have concluded that the words in Section 1221(1) were ambiguous on the point on which it sought supplemental guidance from a Congressional committee report (i.e. that the words might plausibly be read to single out an identifiable but unmentioned group of taxpayers, securities traders, for unique adverse tax treatment). That is a conclusion the English language effectively precludes -- there isn't a hint of that meaning in the words actually in the statute.

Having imprudently decided to look to legislative history, the Burnett court got an element of that history, which it deemed crucial, precisely backwards. Burnett at page 607, in the heart of its analysis, unambiguously holds that Mrs. Burnett's $18,964 in trading losses would have been "deductible in full" against other income pursuant to the Revenue Act of 1932.

Burnett simply gets the public record backwards. Under Section 23(r) of the Revenue Act of 1932, Mrs. Burnett clearly would not have had the ability to offset otherwise-taxable income with her trading losses. *See:* Appendix at A28-A29. Burnett incorrectly believes a law was being created in 1934 (singling out securities traders for

adverse treatment on operating losses), when in fact, precisely that prior provision was being repealed by the action of the Congress in enacting Section 63 of the Revenue Act of 1934. Burnett incorrectly assumes the non-existent "clean slate" in connection with amendments/modifications of prior statutes which this Court warned against in Dewsnup v. Timm, *supra,* at 779.

A host of courts apparently have blindly followed Burnett and its progeny, without adequate independent review of the public record under its reasoning. *See e.g.* George R. Kemon v. Commissioner, 16 T.C. 1020, 1032 (1951); MacAdams v. Commissioner, 62 T.C.M. 1991-410, 568; Wood v. Commissioner, 16 T.C. 213, 219-220 (1951); United States v. Wood, 943 F.2d 1048, 1051 (9th Cir. 1991)(relying on Kemon, *supra,* which relies on Burnett). Several decades of repetition of the same litany of mistakes, in analysis and research of the legislative history, is no reason that petitioners, here, or any other taxpayers, should be burdened with an onerous tax nowhere found in the tax law. To the contrary, the degree of unthoughtful repetition of the error, by a number of courts below, is reason why the Supreme Court should exercise its powers of supervision of the lower courts by granting certiorari and correcting the mistake.

Its' really very simple -- and it's really an issue of fact: If the United States can convince a jury that Mr. Nordberg made hundreds of sales, all in the absence of "customers," the jury will rule for the government. Conversely, if the jury concludes, as petitioners believe, that the common meaning of the word "customer" makes the government's position oxymoronic, petitioners will prevail

before a jury. In any event, it was not the trial judge's finding to make in a jury case.

F. The Supreme Court Should Issue A Writ Of Certiorari Because Resolution Of The Questions Presented May Have A Significant Financial Impact On The Federal Government's Finances.

While the amount of money in controversy here (about $70,000 including interest) is small in the context of the federal budget, the tax issue presented is large. Each hour of each business day literally billions of dollars change hands in connection with various securities trading activities. One can only imagine how many professional securities traders might incur an annual loss, particularly in a year like 1987 (as here) in which the market crashed. A decision by the Supreme Court in this case has the potential to significantly affect the federal government's finances.

If the Supreme Court accepts this case and reverses, the decision will do nothing more than put this issue in the proper forum - the Congress. During 1932 - 1934 the Congress did enact precisely the sort of law the courts below incorrectly held continues to this day. If the Congress wants to, it can pass another such law at any time.

SUMMARY

In 1932 the Congress passed a law (*72nd Cong. Sess. I, Chapter 209, Section 23(r)* - Section 23(r) of the Revenue

Act of 1932; *See* Appendix at A28-A29) in which it set up a clear income tax dichotomy, under which operating losses of securities traders and securities dealers were treated differently. That law placed securities traders in the uniquely disadvantaged position of being the only businessmen or tradesmen whose losses on day-to-day operations were not ordinary losses for income tax purposes. By 1934 the Congress had repealed that provision. *See: 73rd Cong. Sess. II, Chapter 277, Section 63*. Having repealed the prior clear provision, the Congress has never seen fit to enact a statutory provision stating a simple intent of the Congress to single out securities traders for income tax purposes and treat their possible operating losses in the unique and adverse manner suggested by the government and the courts below, here. A naked statement to the contrary in a Congressional committee report, followed by a seminal decision, Burnett, 40 B.T.A. 605 (1939) which looked imprudently to legislative history, then failed to grasp that Section 23(r) had ever been enacted, is no reason that petitioners, or any other taxpayers, should be burdened with an onerous tax treatment nowhere found in the law.

The words at issue here, "ordinary course," and "to customers," are totally defective in communicating the meaning imputed to them by the government and several courts below -- a narrow intention to single out securities traders from all other business people and trades people in the United States economy for a unique adverse income tax treatment. The words provide no clue, whatsoever, that they might be intended to single out a specific class of taxpayers nowhere mentioned therein. Using them to impose an onerous tax on a readily identifiable group of taxpayers, securities traders, raises an issue of due process. There is no

notification in the tax code of the tax purportedly imposed.

The courts below (*See*: Appendix at A21-A22) give no credence to the notion that the undefined terms in a statute ("to customers," and "ordinary course" in this case) should be viewed as having their normally understood meanings, as demonstrated in common usage and found in the dictionary. Indeed, they treat that suggestion with disdain. This is in contrast with the Supreme Court's common sense willingness to look to commonly understood meanings for words not defined in a statute -- and to the dictionary. *See:* Reves v. Ernst & Young, ___ U.S. ___, 113 S.Ct. 1163, 1169, 122 L.Ed.2d 525, 535-536 (1993).

The unwillingness of the courts below to consider accepted meanings for undefined words in a federal statute is another example of the poor and dangerous thinking found in the decisions below and the precedents on which they rest. Where are citizens supposed to get the meaning of terms used in federal statutes (when they are not defined in the statute), if we are not going to look to commonly accepted meanings and the dictionary? The tax law is supposed to be written and construed in English, not some obtuse code in which concepts which could be readily and clearly embodied in the text of the statute are purportedly disclosed in obscure legislative history, which is effectively hidden from the taxpayer.

The notions underlying the decisions below can only serve to foster disdain for our system of law and the judicial apparatus which is entrusted with the responsibility to adjudicate it. How can citizens follow the law, or make business judgments in response to the tax law as petitioners

did here, if the law is so hidden from discovery -- not in the statute but in an obscure Congressional committee report more than sixty years old? There is every reason to expect that the outlook demonstrated by the courts below, here, will result in other errors in other cases where statutes must be interpreted. The decisions below are symptomatic of a basic failure to realize that a court cannot read into a statute, from extrinsic sources, a meaning nowhere credibly suggested by the words in the statute. They are symptomatic of and in *de-facto* sympathy with the notion that a system of hidden laws is acceptable in our society. That is a very troublesome notion.

There is no discussion below, here, or in the precedents relied upon therein, much less a credible explanation for the phenomenon in which, under the tax law, a multitude of identifiable classes of taxpayers are singled out by the Congress in individual sections of the code for distinct tax treatment and, indeed, securities dealers and securities traders are singled out in Section 1091 for distinct, dichotomous tax treatment on a portion of their activities, wash sales -- yet the Congress allegedly sees fit to omit from the text of the statute so important a tax concept as distinguishing between the basic nature of the income or loss (capital or ordinary) incurred by securities traders and securities dealers. The "spin" imputed by the courts below has an Alice-in-Wonderland tone to it, particularly when we consider it against the fact that precisely the dichotomy imputed by those courts from outside the statute existed in 1932-1934, but was explicitly removed from the language of the statute in 1934, indeed by the enactment of the very statute whose committee report the courts have turned to for their contrary holding.

The issues raised here are indicative of problems deeper than the single decision being appealed. They are indicative of a judiciary too prone to look everywhere -- except to the statute -- for the meaning of the law. They are indicative of a judiciary which looks everywhere -- except to the dictionary and the commonly understood meaning of words in the English language -- in its effort to force a decision not found in the words of the statute by concocting nonsensical meanings for its terms.[4]

The pivotal concept is simple and clear: At one time (1932-1934) precisely the legal concept found by the courts below (i.e. that securities traders could not characterize losses from their day-to-day operations as ordinary losses, freely available to offset other taxable income) was clearly contained in the tax code. It was there because the Congress put it there. Then is was removed from the tax code, because the Congress saw fit to remove it. That simple history must constitute repeal of the provision. If it does not constitute an unambiguous repeal, the law is demeaned, because the citizenry can't find the law in the statutes and are less able to follow it.

The Supreme Court should grant certiorari in this case to exercise its important powers of supervision over the federal judiciary -- clearly instructing the lower courts to

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[4] ***The Government's position and the decisions below are founded on the incredible notion that, in securities sales transactions relevant to this dispute, the "customer" is the one who sells, not the one who buys. There is no concept of the term "customer," in the English language, including tertiary and arcane meanings, in which the "seller" is the "customer" -- the buyer is the customer. (See Government Brief on Appeal at p. 22).***

look to the words in a statute for its meaning and to scrupulously avoid attempting to impute into the statute a meaning not plausibly found in those words -- and clearly instructing the lower courts that, when the Congress removes a provision which previously was clearly stated in a statute and fails to replace it with another clearly stated similar provision within a statute, the prior provision is repealed and no longer is in effect.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted

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December 3, 1996

[NOT FOR PUBLICATION]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1432

UNITED STATES OF AMERICA,
Plaintiff, Appellee

v.

PAUL C. NORDBERG,
Defendants, Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS
[Hon. Nathaniel M. Gorton, United States District Judge]

Before
Torruella, Chief Judge,
Cyr and Stahl, Circuit Judges

Paul C. Nordberg on brief pro se.
Loretta C. Argrett, Assistant Attorney General, William S. Estabrook, Thomas V.M. Linquanti, Tax Division, Department of Justice, and Donald K. Stern, United States Attorney, on brief for Appellant

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October 10, 1996

Per Curiam. We have reviewed de novo the district court's grant of summary judgment in favor of the plaintiff-appellee. We conclude that the determination was correct and see no need to write separately. We, therefore, affirm, essentially for the reasons stated in the district court's memorandum and order, dated April 8, 1996. We add only the following comments.

At page 6 of its memorandum and order, the district court made a slip of the pen. In reciting the summary judgment standard, the court stated that it must view the entire record in the light most favorable to the "plaintiffs" and indulge all reasonable inferences in their favor. In this case, the government was the plaintiff and the moving party. Obviously, the district court meant to refer to the "defendants," as the non-moving party. It is clear from the next paragraph and the remainder of the opinion that the district court understood the relative burdens of the moving and non-moving parties, understood which party carried which burden in this case, and applied the correct standard. Contrary to the appellants' attempt to create an issue that does

not exist, the district court did not "reverse the rule for inferences." Brief at p. 35.

In addition, we note that the government has conceded that, because it has already applied the appellants' income tax overpayments for the tax years 1991 and 1992 to the balance it claimed the appellants owed for the tax year 1987, the amount of these overpayments was properly credited to the amount owed by the taxpayers.

Appellants' request for oral argument is denied. The alternate request that we accept supplemental material in lieu of oral argument is denied. The supplemental materials should have been included within the permitted number of pages in the reply brief. In any event, we have reviewed this supplemental material and it does not change our decision.

The "emergency motion" is denied as moot.

Affirmed. Loc. R. 27.1

APPENDIX - NORDBERG V. UNITED STATES

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1432

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

PAUL C. NORDBERG
Defendant - Appellant

JUDGMENT

Entered: October 10, 1996

This cause come on to be submitted on the briefs and the original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court
William H. Ng - Clerk

CC: Paul Nordberg, Pro se
Loretta C. Argrett, Esq.
William S. Estabrook, Esq.
Thomas V.M. Linguanti, Esq.
Donald K. Stern, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff v. PAUL C. NORDBERG and DEBRA L. NORDBERG, Defendants	Civil Case No. 93-12681- NMG

MEMORANDUM AND ORDER

GORTON, J.

There are five motions currently pending before this Court in the above-titled civil action: 1) defendants' motion for judgment on the pleadings [Docket #11], 2) plaintiff's motion for partial summary judgment on defendants' counterclaim [#12], 3) defendants' motion to compel [#17], 4) plaintiff's motion for a protective order [#18] and 5) plaintiff's motion for partial summary judgment [#20]. For the reasons that follow, the defendants' motion to compel will be denied and plaintiff's motion for summary judgment will be allowed; the remaining motions will, therefore, be denied as moot.

I. Introduction

On December 9, 1993, the United States government field this civil action, pursuant to 26 U.S.C. # 7405, to collect what it asserts was an erroneous refund paid to defendants. Section 7405 provides that "[a]ny portion of a tax imposed by this title, refund of which is erroneously made,...may be recovered by civil action brought in the name of the United States." The dispute arises out of defendants' 1987 tax return, which was the subject of a lengthy IRS adult that lasted until May, 1990. The issue in the case is whether the defendants' treatment of their 1987 securities trading losses on their 1987 tax return was erroneous as a matter of law.

Although an initial "Audit Report" issued by the IRS to the Nordbergs in May, 1990. indicated no deficiency, the agency later alleged a deficiency of $30,665, plus interest. By December 10, 1991, defendant paid, under protest, the entire amount of the alleged deficiency.

In later December, 1991, the IRS issued a check payable to defendants for $45,188.25 as a refund for overpayment of their 1987 taxes. In May, 1992, however, the IRS informed defendants

that the refund was erroneous and requested repayment. Defendants, claiming that the refund was owed to them, refused to return the money. Subsequently, the IRS refused to refund defendants' claimed overpayments on their 1991 and 1992 tax returns but instead applied these amounts ($2,430 and $5,317, respectively) to the claimed outstanding liability.[1]

On December 9, 1993, the United States filed the instant suit to recover the amount of the erroneous refund plus statutory interest. The defendants filed an answer and counterclaim on December 29, 1993, seeking return of the money held by the IRS as credits towards repayment of the alleged deficiency.

II. **Defendants' Motion to Compel [Docket #17]:**

Defendants' motion to compel asserts that the government has repeatedly objected to and declined to answer requests for admissions and

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[1] The IRS withheld the later refunds pursuant to 26 U.S.C. #6402(a), which provides that "[i]n the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment...."

interrogatories concerning various aspects of the IRS' audit of their 1987 tax return. The importance of the audit, at least to the defendants, is further evidenced by their expressed desire to depose IRS employees involved during the process, which has led the government to file a motion for a protective order. The government responds that, in light of the sole issue at stake in the underlying action, the defendants' requests for admissions and production of documents fail to satisfy the requirements of Fed.R.Civ.P. 26(b). This Court agrees.

Resolution of the case at bar turns solely on the specific issue of whether the Nordbergs' treatment of their 1987 treading losses was erroneous as a matter of law. Their discovery requests seek to obtain information about the reasoning and processes by which IRS employees involved in the audit of the taxpayers' return decided to assess the tax liabilities with respect to their trading transactions. The discovery does not relate to the facts existing during 1987, upon which the IRS determinations were based. In light of the principal that a challenge to a tax determination results in a trial de novo rather than a review by this Court of an existing administrative record, the

defendants' discovery requests fail to satisfy the mandate of Fed.R.Civ.P. 26(b) that information sought to be discovered be relevant or "reasonably calculated to lead to the discovery of admissible evidence." See, e.g. Lewis v. Reynolds, 284 U.S. 281, 283 (1932); Ruth v. United States, 823 F.2d 1091, 1094 (7th Cir. 1987) ("courts conduct a de novo review of the... assessment"); Greenberg's Express, Inc. v. Commissioner, 62 T.C. 324, 328 (1974) (a court's determination as to a taxpayer's liability "must be based on the merits of the case and not on any previous record developed at the administrative level.").

The information sought by defendants which forms the basis for the motion to compel is, therefor, evidence which would not be relevant to determining their 1987 tax liability. Information about people who participated in the audit is not relevant, nor are notes made by IRS employees during the audit. Indeed, the audit of the Nordbergs' 1987 tax return took place well after the tax year at issue. In short, the information requested by defendants has no bearing on the sole issue in the case at bar because the Nordbergs' ultimate tax liability is not influenced by the IRS' conduct or findings during the audit. In rejecting a similar

argument, one District Court denied a motion to compel upon observing that:

> the opinions, impressions, conclusions and reasoning of IRS agents are irrelevant to the validity of the assessment against [the taxpayer]....Resolution of the [] issues depends solely on application of the pertinent law to the facts of [the] case....[T]he opinions of individual IRS agents regarding their propriety is immaterial.

Garity v. United States, 81-2 U.S.T.C. (CCH) P 9599, 1980 WL 1765 at *2 (E.D. Mich. May 20, 1980). Similarly, the Southern District of New York has recognized that:

> [t]he subjective analysis of the agent and technical advisor based upon the information derived from [taxpayer's] records and their respective opinions as to the proper method to be appllied in determining whether taxes are due form no part of the [taxpayer's] case. While no doubt disclosure of such information would be on interest to [taxpayer], it is not essential nor required for proper

preparation.

Detroit Screwmatic Co. v. United States, 49 F.R.D. 77, 79 (S.D.N.Y. 1970)

Furthermore, if the Nordbergs' treatment of the trading losses on their 1987 tax return was erroneous as a matter of law, they are liable regardless of what an IRS agent, at any time, may have thought. See United States v. Tuthill, 55 F.2d 415, 416 (7th Cir. 1931); United States v. Ellis, 154 F. Supp. 32, 38 (S.D.N.Y. 1957), aff'd, 264 F.2d 325 (2nd Cir. 1959); see also Flamingo Fishing Corp. v. United States, 31 Fed. Cl. 655, 658 (1994) (where the Court of Claims allowed the government's motion for protective order precluding taxpayer from deposing IRS agents because agents' opinions and conclusions regarding the applicable Code provisions were irrelevant to the determination of the case). Accordingly, defendants' motion to compel will be DENIED.

III. Plaintiff's Motion for Partial Summary Judgment [Docket #20]:

The government has also filed a motion for "partial summary judgment on the issue of the nature of the defendants' losses from trading in 1987." In the memorandum in support of its

motion, the government enumerates the "questions presented" to the Court as: 1) whether Paul Nordberg was a trader or a dealer with respect to the options he traded in 1987, and, accordingly, 2) whether the losses from the trading activity are properly capital or ordinary. The Nordbergs vigorously contest the government's assertion that there is no genuine issue of any material fact with respect to the nature of the losses, and, therefor, it is important for this Court to identify precisely the material facts upon which plaintiff bases its motion.

A. The Summary Judgment Standard

Summary judgment shall be rendered where the pleadings, discovery on file and affidavits, if any, show "there is no genuine issue of material fact and...the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). This Court must view then entire record in the light most favorable to the plaintiffs and indulge all reasonable inferences in their favor. O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993).

With respect to a motion for summary judgment, the burden is on the moving party to show that "there is an absence of evidence to

support the non-moving party's case." FDIC v. Municipality of Ponce, 904 F.2d 740, 742 (1st Cir. 1990) (quoting Celotex Corp. v. Catrett. 477 U.S. 317, 325 (1986)). If the moving party satisfies that burden, it shifts to the non-moving party to establish the existence of a genuine material issue. Id. In deciding whether a factual dispute is genuine, this Court must determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The nonmovant's assertion of mere allegation or denial of the pleadings is insufficient on its own to establish a genuine issue of material fact. Fed.R.Civ.P. 56(e).

B. Material Facts

On their joint income tax return for 1987, the Nordbergs reported, on Schedule "C" (entitled "Profit of (Loss) from Business or Profession"), a loss of $86,821.86. According to a letter written by Paul Nordberg to the Internal Revenue Service, those losses resulted from his trading of securities called "OEX options," which are "puts" and "calls" indexed to a basket of stocks in the Standard & Poor's 100. In response to the United States' Requests for Admissions, Paul Nordberg admitted that his

trading of securities in 1987 was done "exclusively for an account" in the Nordbergs' name at Shearson, Lehman Brothers. Government Exhibit 9 at p. 4.

Moreover, Mr. Nordberg admitted that he was aware of no facts or evidence that in 1987 he ever traded securities except through a "securities exchange," assuming that that term encompasses the Chicago Board of Exchange. Id. at pp. 5-6. By reporting the losses on a Schedule C form, the Nordbergs claimed the entire trading loss as an ordinary business loss. An audit by the IRS followed, with which the defendants cooperated fully.

At the conclusion of the exhaustive audit, the only unresolved substantive issue was whether Paul Nordberg's trading losses for the 1987 tax year were capital or ordinary. Indeed, in a letter to the IRS dated May 8, 1989, Mr. Nordberg wrote that:

> [T]he only material, unresolved matter is the proper treatment...of Nordberg's trading of securities.... The issue to be determined is whether Nordberg is limited to a maximum "Capital Loss" deduction of $3,000 (for 1987) or is

> entitled to treat the entire net trading loss in 1987 as the loss incurred in a "business" or "trade", and therefor [sic] deductible in its entirety in 1987.

Government Exhibit 2, p 2.

According to an "Income Tax Examination Changes" form dated July 11, 1990, the IRS changed the characterization of the Nordbergs' 1987 loss to a capital loss. Government Exhibit 3. Consequently, the IRS proposed a deficiency of $30,665, plus interest, for a total of $44,015.70. In November and December of 1991, the defendants made payments by check in the amount equal to the total assessment plus interest.

By what the IRS admits was mistake, it issued a refund check to the Nordbergs on December 20, 1991, for $45,188.25, representing the payments made by defendants plus $388.25 in interest. Government Exhibits 4, 6. In early 1992, the IRS sent the defendants a notice that 1) informed them that the refund check had been issued erroneously, and 2) requested repayment. Government Exhibit 7. By letter dated February 14, 1992 to the IRS Center Director, the

Nordbergs informed the Service that they would not return the money. The government then commenced the pending lawsuit.

C. Legal Analysis

Sections 165(a) and (c) of the Internal Revenue Code permit individuals to deduct losses incurred in a trade or business or in a transaction entered into for a profit. 26 U.S.C. Section 165(a), (c). Section 165(f) provides, however, that capital losses are deductible only to the extent allowed by sections 1211 and 1212. Under section 1211, an individual's capital losses are deductible only to the extent of capital gains, plus $3,000 of ordinary income.

Section 1221 of the Code broadly defines the term "capital asset" as "property held by the taxpayer (whether or not connected with his trade or business)," and then narrows that definition by enumerating various exceptions. The relevant provision in the case at bar is section 1221(1), which excludes from the definition of capital assets:

> stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the

> taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business [.]

26 U.S.C. #1221(1).

In the case at bar, the government maintains that 1) Paul Nordberg was a trader in securities (as opposed to a dealer) who engaged in securities transactions entirely on his own account and lacked "customers," and 2) he cannot, therefore, invoke the exception to the definition of capital asset provided by #1221(1). The government asserts that the Nordbergs' 1987 losses were therefore capital in nature and, accordingly, they must repay to the United States "the portion of the refund attributable to the disallowance of the Nordberg's ordinary loss claim." Government memorandum at 14.

To determine whether securities constitute "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business," see #1221(1), courts have identified three classifications of purchasers of securities: dealers, traders and investors.

E.g., United States v. Wood, 943 F.2d 1048, 1051 (9th Cir. 1991); King v. Commissioner, 89 T.C. 445, 457-458 (1987). Of those three classifications, only the first two are relevant to the case at bar. "The tax liability of a seller of securities depends upon which classification best identifies the seller; dealers may qualify for [the #1221(1) exception], while traders and investors do not." Wood, 943 F.2d at 1051.

The critical issue in distinguishing between dealers and traders is whether the taxpayer has "customers." Wood, 943 F.2d at 1050-1053. The United States Tax Court explained that a "dealer" is a person who purchases securities or commodities with the expectation of realizing a profit

> not because of a rise in value during the interval of time between purchase and resale, but merely because they have or hope to find a market of buyers who will purchase from them at a price in excess of their cost. Their excess or mark-up represents renumeration for their labors as a middle-man bringing together buyer and seller, and performing the usual services of

retailer or wholesaler of goods.

Kemon v. Commissioner, 16 T.C. 1026, 1032-1033 (1951). The Kemon Court thus employed a "merchant" analogy to determine whether a seller of securities is a dealer who sells to "customers" for purposes of section 1221. See id.; See also Wood, 943 F.2d at 1051; United States v. Diamond, 788 F.2d 1025, 1029 (4th Circ. 1986).

"Traders," on the other hand, are sellers of securities or commodities who "depend upon such circumstances as a rise in value or an advantageous purchase to enable them to sell at a price in excess of cost." Kemon, 16 T.C. at 1033. In contrast to dealers, traders "perform [] no merchandising functions nor any other service which warrants compensation by a price mark-up of the securities he or she sells." Id at 1032-1033; Diamond, 788 F.2d at 1029. A trader will be deemed to be engaged in a "trade or business" if his or her trading is frequent and substantial. King, 89 T.C. at 458. As the Wood Court observed, however, although "[g]enerally both dealers and traders will be engaged in a trade or business[,] only a dealer...has customers." 943 F.2d at 1052. In short, unlike a trader, a dealer in securities

or commodity futures can take advantage of the section 1221(1) exception to capital assets tax treatment because the later deals in property held "primarily for sale to customers in the ordinary course" or business. Id.; see also 26 U.S.C. #1221(1).

The foregoing cases illustrates that, even when a taxpayer is engaged in a trade or business of selling securities, the gains or losses derived from that activity are nonetheless capital in nature if the taxpayer has no customers. See Diamond, 788 F.2d at 1028; King, 89 T.C. at 458. In Diamond, for example, the Court of Appeals observed that the taxpayer's emphasis upon the significant financial and hourly commitment to securities trading "misses the crucial point that, whether or not his 1980 transactions amounted to a trade or business, he was not selling 'to customers' for the purposes of #1221(1).[2]

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[2] It is worth noting that the phrase "to customers" was added to the predecessor or #1221(1) to exclude from the definition of capital assets only those securities bought and sold by dealers, and not those traded by investors on their own account. See Mirro-Dynamics Corp. v. United States, 374 F.2d 14, 16 (9th Cir. 1967) (citing legislative history); see also MacAdam v. Commissioner, 62 T.C. Memo. 1991-410, 1991 WL 157917 (1991).

APPENDIX - NORDBERG V. UNITED STATES

Numerous cases demonstrate that a taxpayer who trades solely on his own account through a broker has no customers with respect to the securities so traded. Diamond, 788 F.2d at 1028 ("courts have clearly and consistently held that a taxpayer who trades securities for his own account does not sell 'to customers' within the meaning of #1221(1)"); Van Suetendael v. Commissioner, 152 F.2d 654 (2nd Cir. 1945) (per curiam). In the instant case, the Nordbergs admit both that their trading of securities in 1987 was exclusively for an account in their name at Shearson, Lehman Brothers and that they are aware of no facts or evidence that in 1987 they ever traded securities other than through a securities exchange. Government Exhibit 9 at p. 4.

Defendants attempt to avert summary judgment merely by reciting that " a significant factual issue in dispute in this case is whether [defendants] had 'customers'" and citing a dictionary definition of the term "customer" (i.e. "one that purchases a commodity or service"). Opposition at 9. Defendants further reason that:

> by that straightforward meaning of the term ,there could not have been sales

> (which there undisputedly were) in the absence of the "seller" (Paul Nordberg) having "customers." A "customer" is always needed for a sale to occur.

Id.

Several courts have, however, considered and rejected the argument that securities sold by taxpayers through a broker eventually reach customers. See e.g. George e. Warren Co. v. United States, 53 F. Supp. 578, 581 (D. Mass. 1944) ("[w]hile it may be contended that each time [the taxpayer corporation which was not a dealer in securities] sold the securities it dealt with a customer, such is not true within a fair reading of the taxing statute."); Mirro-Dynamics, 374 F.2d at 16 (rejecting taxpayer's argument that securities it sold eventually reached customers); Seeley v. Helvering, 77 F.2d 323, 324 (2nd Cir. 1935) ("So far as [the taxpayer] traded securities on his own account, his sales were on the exchange to persons whom he did not even know; these were not his customers.....").

In Swartz v. Commissioner, for example, the Tax Court dismissed the taxpayer's argument that his commodity contract trades, all of which were

made through Merrill Lynch or Prudential-Bache, were made to "customers." Rather, the Court observed that those brokerage houses "were not [taxpayer's] customers, but....[he] was one of their customers," and the court declined to regard as the taxpayer's customers "the nameless members of the commodity markets who ultimately purchased the commodity contracts [taxpayer] sold and sold the commodity contracts [he] purchased." T.C. Memo 1987-582, aff'd 876 F.2d 657 (8th Cir. 1989), cert. denied 494 U.S. 1006 (1990)

In short, if a taxpayer transacting in securities has no customers, then that taxpayer cannot, within the meaning of the second clause of a #122191), hold securities "primarily for sale to customers in the ordinary course of his trade or business." As the Fourth Circuit noted in Diamond,

> [t]he government's position....merely reflects the well-settled rule that a trader buying and selling securities exclusively for his own account does not sell 'to customers," whatever the character of his transactions.

788 F.2d at 1030.

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A taxpayer without customers likewise cannot satisfy the first clause of #1221(1), to wit, hold the securities as "stock in trade....which would properly be included in inventory of the taxpayer if on hand at the close of the taxable year." The general rules governing inventories are enumerated at section 471 of the Internal Revenue Code. See 26 U.S.C. #471. Tellingly, regulation 1.471-5, promulgated under that Code section, applies to taxpayers who are "dealers" in securities, and states that:

> For the purposes of this section, a dealer in securities is a merchant of securities...,with an established place of business, regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom....Taxpayers who buy and sell securities for investment or speculation, irrespective of whether buying and selling constitutes the carrying on of a trade or business,...are not dealers in securities within the meaning of this section.

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Treas. Reg. 1.471-5 (emphasis added); see also Mirro-Dynamics, 374 F.2d at 16; Swartz v. Commissioner, 876 F.2d 657, 659 (8th cir. 1989) (rejecting taxpayer's argument that his commodities futures contracts were property he included in inventory at the end of each year, explaining that "[c]ommodity futures contracts are capital assets in the hands of a trader.") cert. denied, 494 U.S. 1006 (1990).

This Court concludes, therefore, that the securities that Mr. Nordberg purchased and sold for his own account at Shearson, Lehman Brothers were capital assets in his hands, and the losses from such trading were capital in nature.

ORDER

For the foregoing reasons:

1). The defendants' motion to compel [Docket #17] is **DENIED;**

2) The plaintiff's motion for summary judgment [Docket #20] is **ALLOWED;** and

3) The defendants' motion for judgment on the pleadings [Docket #11], the plaintiff's motion for partial summary judgment on defendants' counterclaim [Docket #12] and the plaintiff's motion for a protective order [Docket #18] are **DENIED AS MOOT.**

So Ordered.

s/Nathaniel M. Gorton
United States District
Judge

DATED: April 8, 1996

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff(s)	)	
v.	)	CIVIL ACTION No. 93-12681-NMG
PAUL C. NORDBERG, and DEBRA L. NORDBERG, Defendant	)	

JUDGMENT

GORTON, D.J.

In accordance with this Court's Memorandum and Order issued on April 8, 1996, allowing plaintiff's Motion for Summary Judgment, it is hereby ORDERED;

Judgment for the plaintiff.

BY THE COURT,

S/ Deborah F. Shattuck,
Deputy Clerk in Charge

DATED: April 8, 1996

SECTION 23(r)
REVENUE ACT OF 1932

(r) LIMITATION ON STOCK LOSSES

(1) Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as defined in section 101) shall be allowed only to the extent of gains from such sales or exchanges (including gains which may be derived by a taxpayer from the retirement of his own obligations).

(2) Losses disallowed as a deduction by paragraph (1), computed without regard to any losses sustained during the preceding taxable year, shall, to an amount not in excess of the taxpayer's net income for the taxable year, be considered for the purposes of this title as losses sustained in the succeeding taxable year from sales or exchanges of stocks or bonds which are not capital assets.

(3) This section shall not apply to a dealer in securities (as to stocks and bonds acquired for resale to customers) in respect of transactions in the ordinary course of his

business,nor to a bank or trust company incorporated under the laws of the United States or of any State or Territory, nor persons carrying on the banking business (where the receipt of deposits constitutes a major part of such business) in respect of transactions in the ordinary course of such banking business.